APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 1139--August Term, 1981
(Argued May 6, 1982 Decided May 18, 1982)
Docket No. 82-7247

IN RE: COORDINATED PRETRIAL PROCEEDINGS IN PETROLEUM PRODUCTS ANTITRUST LITIGATION,

MDL Docket No. 150 WPG
All State Cases

APPEAL OF McGRAW-HILL, INC.,

Witness-Appellant,

-against-

THE STATES OR ARIZONA, CALIFORNIA, FLORIDA, OREGON and WASHINGTON,

Plaintiffs-Appellees.

Before:

FRIENDLY, KAUFMAN and PIERCE,

Circuit Judges.

Appeal from an order of contempt imposed by the United States District Court for the Southern District of New York, Gray, J.,* on non-party witness McGraw-Hill, Inc. for refusing to comply with an order requiring disclosure of the names of confidential sources.

Vacated and remanded.

WILLIAM F. SONDERICKER, New York, New York (Jeffery H. Sheetz, Robert N. Landes, Barbara E. Schlain, Kenneth M. Vittor, Olwine, Connelly, Chase, O'Donnell & Weyher, New York, New York, of Counsel), for Witness-Appellant McGraw-Hill, Inc.

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* Of the United States District Court for the Central District of California, Sitting in the Southern District of New York pursuant to 28 U.S.C. §1407(b).

STEPHEN L. DUNNE, Special Assistant Attorney General, Del Mar, California (Jim Smith, Bill L. Bryant, Jr., Jerome W. Hoffman, David G. Guest, Tallahassee, Florida, of Counsel), for Plaintiffs-Appellees The States of Arizona, California, Florida, Oregon and Washington.

JACK C. LANDAU, Judy D. Lynch, Washington, D.C., for Amicus Curiae The Reporters Committee for Freedom of the Press.

ROBERT A. SALTZSTEIN, Stephen M. Feldman, Wyatt, Saltzstein, Lepsen & Hamberger, Washington, D.C., for Amicus Curiae American Business Press, Inc.

STEPHEN H. GROSS, Duncan Noble Darrow, Victor A. Kovner, Harriette K. Dorsen, O'Sullivan, Wolfe, Karabell & Graev, Lankenau, Kovner & Bickford, New York, New York, for Amicus Curiae Magazine Publishers Association, Inc.

PER CURIAM:

This is an appeal from Judge William P. Gray's Order[1] holding McGraw-Hill, Inc. in civil contempt for refusing to produce a document in the possession of Ernest McClelland, an employee of McGraw-Hill, containing certain names and confidential sources. The document was requested pursuant to a subpoena duces tecum served on McGraw-Hill as a non-party witness by the States of Arizona, California, Florida, Oregon and Washington ("States") in connection

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1 Judge Gray entered the order while sitting in the Southern District of New York pursuant to 28 U.S.C. § 1407(b). Appeal of that order is properly before this Court. In re Corrugated Container Antitrust Litigation, 644 F.2d 70, 74 n.6 (2d Cir. 1981).

with a multidistrict litigation brought against seventeen oil companies alleging violations of the Sherman Act, 15 U.S.C. § 1. Because the law regarding the qualified privilege of reporters as it applies in this case is relatively clear, there is no need for us to engage in an elaborate exegesis at this time. Since we believe that under controlling case law the record before us does not support a requirement that McGraw-Hill reveal the names of confidential sources, we vacate and remand the case to the district court.

A brief review of the underlying litigation will place our analysis of Judge Gray's order in context and will demonstrate the inadequacy of the

States' showing of a need for disclosure. The States filed suits against seventeen oil companies seeking treble damages for numerous violations of the antitrust laws.[2] The allegation relevant to this appeal is their contention that the oil companies engaged in a conspiracy to fix the prices of refined oil

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2 The complaints in this action were filed by the States individually between July 1973 and February 1977. In August 1976, the Judicial Panel on Multidistrict Litigation transferred the then pending cases to the Central District of California for coordinated pretrial proceedings. In re Petroleum Products Antitrust Litigation, 419 F.Supp. 712 (J.P.M.L. 1976). The states are suing in their proprietary capacity, as class representatives of consumers who purchased gasoline at retail, as class representatives of political entities that purchased gasoline and other refined petroleum products, and on behalf of their citizens as parens patriae.

products, especially retail gasoline. Believing that the conspiracy may have been facilitated by communications to and from trade publications, the States on May 1, 1980 caused a subpoena duces tecum to be served upon Platt's Oilgram Price Service, a division of McGraw-Hill, Inc. The Service published Platt's Oilgram Price Report[3] ("Platt's"). The subpoena required production of any document referring to communications concerning petroleum products

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3 Platt's is a news service that reports news of sales, prices, current events, marketing developments and economic trends in the petroleum industry. It also operates a Telex service reporting on developments in the oil industry.

prices for the period 1970-73.[4]

McGraw-Hill did not fully comply with

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[4] Specifically, the subpoena called for production of any document showing, for the years 1970-1973, the names of any:

> (b) persons with whom you communicated by any means for the purpose of obtaining petroleum products price information;
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> (c) persons who communicated with you by any means for the purpose of furnishing to you petroleum products price information;
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> (d) persons who communicated with you by telephone, teletype or other electronic means for the purpose of obtaining from you petroleum products price information;
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> (e) persons with whom you communicated by telephone, teletype or other electronic means for the purpose of furnishing to them petroleum products price information; and
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> (f) persons whom you reasonably believed had knowledge of petroleum products price information, and whose addresses or telephone numbers were kept by you.

the subpoena. Invoking the privilege from the disclosure afforded reporters, McGraw-Hill declined to produce certain documents which contained the names of confidential sources of information.[5]

Judge Gray held a hearing on December 3, 1981 and concluded that the interest of the States in the names of the confidential sources outweighed the First Amendment right of McGraw-Hill.[6] Accordingly, he

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5 McGraw-Hill withheld a list of four names possessed by J. Bruce Chalfant, an editor-reporter of Platt's who left McGraw-Hill's employ in February 1981, and a list of seven names possessed by Platt's editor-reporter Ernest McClelland.

6 Although Judge Gray did not file a written opinion explaining his decision, a transcript of the December 3, 1981 hearing permits us to understand his reasoning.

ordered that the names be disclosed.[7] When McGraw-Hill persisted in its refusal to reveal the names maintained by Platt's editor Ernest McClelland, Judge Gray imposed a fine of $100 per day on McGraw-Hill for civil contempt.[8] This appeal followed.

The law in this Circuit is clear that to protect the important

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7 At the conclusion of the hearing, when personally faced with contempt, Chalfant chose to disclose to the States the four names he had withheld. Two of the names on McClelland's list were revealed to the States because McGraw-Hill determined that they were not confidential. Thus, at this time, the case involves a dispute only over the names of five confidential sources of information.

8 After determining that McGraw-Hill was the real party in interest, Judge Gray imposed the order of contempt upon McGraw-Hill rather than on its employee McClelland.

interests of reporters and the public in preserving the confidentiality of journalists' sources, disclosure may be ordered only upon a clear and specific showing that the information is: highly material and relevant, necessary or critical to the maintenance of the claim, and not obtainable from other available sources. Baker v. F & F Investment, 470 F.2d 778, 783-85 (2d Cir. 1972), cert. denied, 411 U.S. 966 (1973). Accord, Zerilli v. Smith, 656 F.2d 705, 713-15 (D.C. Cir. 1981); Silkwood v. Kerr-McGee Corp., 563 F.2d 433, 438 (10th Cir. 1977). Upon careful review of the record, we are convinced that there was an insufficient basis for ordering identification of the confidential sources.

In Branzburg v. Hayes, 408 U.S. 665 (1972), the Supreme Court held that reporters do not possess a blanket exemption from testifying before a grand jury. In his concurring opinion, however, Justice Powell[9] emphasized the limited nature of the Court's holding, and stated that:

> if the newsman is called upon to give information bearing only a remote and tenuous relationship to the subject of the investigation, or if he has some other reason to believe that his testimony implicates confidential source relationships without a legitimate need of law enforcement, he will have access to the court on a motion to quash and an appropriate protective order may be entered.

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9 Justice Powell cast the deciding vote in Branzburg v. Hayes, 408 U.S. 665 (1972), and therefore his reservations are particularly important in understanding the decision.

Id. at 710. The names of the confidential sources sought in this instance bear at most a tenuous and speculative relationship to their antitrust claims.

The States argue that oil companies may have transmitted price information among themselves by releasing that data to reporters of Platt's. We find no such allegation, however, in their complaints. Rather, the pleadings suggest that the purportedly unlawful communications were directly accomplished through secret telephone lines, unlogged calls and surreptitious meetings. This critical omission is compounded by the complete failure of the States to present any evidence indicating that the involvement of Platt's in fact occurred. Judge Gray acknowledged the absence of proof that the

sources possessed relevant information: "Now I hasten to add I certainly don't know whether any such exchanges took place. I have no information on that whatever." The necessity for confidentiality, essential to fulfillment of the pivotal function of reporters to collect information for public dissemination, cannot be overcome simply by suggesting--with no basis to support the assertion--that the reporter may unknowingly have been used by those sources in their illegal activities.[10]

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10 At the December 3, 1981 hearing, counsel for McGraw-Hill suggested that depositions of the reporters should be taken before disclosure is ordered. Although the States rejected that offer, they did depose Chalfant after he revealed the names of his four confidential sources. At that deposition, it was learned that two of his sources were not even employed by any of the defendant oil companies. A

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Disclosure was also improperly ordered because the States failed to carry their burden of first seeking the information elsewhere. In Branzburg v. Hayes, supra, Justice White, writing for the Court, noted that the Attorney General of the United States had fashioned a set of rules for federal officials in connection with subpoenaing members of the press to testify before grand juries. Id. at 706-07. The Guidelines for Subpoenas to the News Media, expressed in Department of Justice Memo.

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deposition of McClelland may well indicate whether his sources were using him as a part of a price fixing conspiracy by the defendants. The nature of McClelland's possible involvement must certainly be developed prior to assuming that his communications were part of a violation of the antitrust laws. We note that the State of Florida has expressly disavowed any intent to accuse McGraw-Hill of being a co-conspirator.

No. 692 (Sept. 2, 1970), contained the admonition that "all reasonable attempts should be made to obtain information from non-press sources before there is any consideration of subpoenaing the press." Id. at 707.

In Baker v. F & F Investment, supra, we affirmed the district court's refusal to order a journalist to reveal the name of a "blockbuster" whom he had interviewed while preparing a Saturday Evening Post article on housing discrimination because the plaintiffs had not exhausted other available sources of the information. Similarly, in this case, the States have failed to explore any alternative means of discovering whether the oil companies used Platt's as part of their purported price fixing conspiracy. While hundreds of depositions have already been taken, there

is no indication that anyone was asked the simple question "Have you ever communicated pricing information to Platt's?" Additional depositions may be necessary to uncover whether Platt's played any role in the alleged antitrust conspiracy. See also note 10, supra. This requirement is reasonable when balanced against the strain on the First Amendment which the contempt order imposes.[11] In the process, if the

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11 Justice Brennan has suggested that the harm caused by requiring the taking of 65 depositions did not "outweigh the unpalatable choice that civil contempt would impose upon the" reporter ordered to disclose the names of his confidential source. In re Roche, 448 U.S. 1312, 1316 (1980) (Brennan, J. in chambers). Likewise, the District of Columbia Circuit recently recognized that "an alternative requiring the taking of as many as 60 depositions might be a reasonable prerequisite to compelled disclosure." Zerilli v. Smith, 656 F.2d 705, 714 (D.C. Cir. 1981).

States learn that their theory is correct, they may also identify the actual purveyors of price information, thus obviating the need to inquire of Platt's.

The States invite us to disregard these established principles and permit compelled disclosure of confidential sources in the absence of this constitutionally mandated showing simply because the underlying litigation involves the antitrust laws. We decline the invitation to hold violations of the antitrust laws to be sui generis. Although it is true that the Sherman Act represents Congress's strong commitment to fostering a competitive marketplace, enactment of a statute cannot defeat a constitutional provision. In Baker v. F & F Investment, supra, we recognized the strong public policy embodied in the

federal civil rights laws but rejected a similar plea to alter the constitutional test, explaining "[i]t would be inappropriate for a court to pick and choose in such gross fashion between different acts of Congressional legislation, labelling one 'exceedingly important' and another less so, without specific directions from the Legislature." Id. at 783. We do not believe that the antitrust laws should receive a preferred position in this context and, accordingly, refuse to depart from the accepted test expounded in Baker. Indeed, this case presents a less compelling argument for disclosure than in Branzburg v. Hayes, supra, because we are

dealing with a civil action rather than questioning by a grand jury.[12]

Accordingly, we conclude that Judge Gray improperly imposed civil contempt sanctions upon McGraw-Hill in the absence of concrete evidence that the information sought was relevant to the underlying antitrust action and could not be obtained elsewhere. The order is therefore vacated and the case remanded.[13]

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12 Judge Gray likened the instant case to Branzburg v. Hayes, supra. However, in Baker v. F & F Investment, supra, 470 F.2d at 784-85, it was this Court's view that Branzburg was limited to the grand jury setting: "Manifestly, the Court's concern with the integrity of the grand jury as an investigating arm of the criminal justice system distinguishes Branzburg from the case presently before us."

13 On remand, the States may, of course, develop the necessary factual record and then reapply to Judge Gray for a new disclosure order.

APPENDIX B

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

IN RE: COORDINATED PRETRIAL PROCEEDINGS IN PETROLEUM PRODUCTS ANTITRUST LITIGATION	)))))	MDL DOCKET NO. 150 WPG ALL STATE CASES

ORDER

IT IS HEREBY ORDERED:

1. McGraw-Hill, Inc., 1221 Avenue of the Americas, New York, New York, is in Civil Comtempt of this Court for failure to obey an order of this Court, to wit:

On December 3, 1981, at approximately 2:15 p.m. (EST) in the ceremonial courtroom of the United States District Court, Southern District of New York, McGraw-Hill, through its representative counsel and one officer, was ordered by this Court to produce an envelope

containing seven (7) names in the actual possession of Ernest McClelland, an employee of McGraw-Hill, and therefore in the constructive possession of McGraw-Hill. McGraw-Hill thereupon through its counsel, Mr. William F. Sondericker, informed this Court that it would not produce the envelope. Thereafter, on December 15, 1981, in a telephone call at approximately 12:10 p.m. (EST), Mr. William F. Sondericker disclosed the identities of two (2) of the seven (7) names in the McClelland envelope to Mr. Stephen L. Dunne, counsel for the plaintiffs in MDL-150, but Mr. Sondericker refused to disclose the identities of the remaining five (5) individuals listed in the McClelland envelope.

2. In light of the foregoing finding that McGraw-Hill is in Civil Contempt of this Court, a fine of One Hundred Dollars ($100.00) per day is imposed for each day, beginning with the date of entry of this Order, that McGraw-Hill remains in violation of the Order of December 3, 1981. Any execution in respect of said fine is hereby stayed until ten (10) days after McGraw-Hill exhausts all of its rights of appeal and review to any Court with respect to this Order.

3. The fine shall begin to accrue from the date of entry of this Order. Provided, however, that the fine shall cease to accrue upon service of a notice of appeal from this Order upon counsel for the State of Florida, at which time the

fine shall not further accrue until ten (10) days after this Order becomes final.

4. Any amounts that shall have accrued may be purged by McGraw-Hill upon the production of the McClelland envelope to the plaintiffs in MDL-150 within ten (10) days after this Order becomes final.

5. McGraw-Hill shall pay to plaintiffs' counsel one-half of the cost of counsel's round trip air travel to New York, and one-half of counsel's food and lodging expenses for two days in New York.

DATED: January 11, 1982.

WILLIAM P. GRAY
United States District Judge